No. 83-317

In The

SUPREME COURT OF THE UNITED STATES

October Term 1983

SHERMAN BLOCK, Sheriff of the County of Los Angeles, et al.,

Petitioners,

v.

DENNIS RUTHERFORD, et al.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should grant certiorari to review the Court of Appeals' judgment affirming the judgment of the District Court, precise and tailored to the special conditions of the Los Angeles County Central Jail, providing for

1. contact visitation on a limited schedule of a limited number of low-risk pretrial detainees and
2. the opportunity for inmates, who are in the general area when a search of their cells is undertaken, to be sufficiently proximate so that they may observe the process and respond to questions or make requests.

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STATEMENT OF THE CASE

This is a class action against Los Angeles County officials on behalf of inmates in the Los Angeles County Men's Central Jail. The Central Jail is used primarily for the housing of male detainees awaiting trial on criminal charges while the numerous other jail facilities in the geographically widespread Los Angeles County system are used for sentenced inmates. However, the Central Jail also houses some sentenced prisoners. Although there is rapid turnover of short-term prisoners at the Central Jail, a substantial portion of its pretrial population is a

relatively stable group which spends months in the Jail pending resolution of the charges. Seventy five percent of the pretrial detainees housed in the Central Jail are accused of offenses which require three to four months to process in the Los Angeles County courts so that on any given day fully seventy-five percent of the Jail's population is facing three months or more of incarceration. In the universe of pretrial detainees both booked and released during the year of 1977, 1,290 inmates were held more than 180 days and 4,798 were held between 61 and 180 days. Respondents Rutherford, Taylor, and Armstrong were pretrial detainees for thirty-nine months, thirty-three months and fifteen months respectively.

After 17 days of trial, the District Court, in a reported decision (Rutherford v. Pitchess, 457 F.Supp. 104 [1978]. Pet. Appx. 41[1] and in an unreported supplemental memorandum opinion preceded by 4 days of post-trial hearings Pet. Appx. 29, ordered a number of changes in jail conditions.[2] The County accepted most of them but appealed three, two of them being the issues presented by the petition for writ of certiorari.

During the pendency of the initial appeal to the Ninth Circuit, this Court issued Bell v. Wolfish, 441 U.S. 520 (1979). The Ninth Circuit determined that although "the District Court articulated standards that track closely those the Supreme Court subsequently laid down," the appropriate disposition was to remand to the District Court for reconsideration in light of Wolfish. (Memorandum Opinion filed August 8, 1980; Pet. Appx. 17 at 20)

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1 / "Pet. Appx." refers to appendix to the the petition for writ of certiorari.

2 / At the same time the court rejected respondents' contentions in a number of matters. See footnote 6, infra.

On remand the District Court carefully re-examined in light of Wolfish its decision on the three issues which had been appealed, recognized that some difference in analysis was required, and concluded that no change in result was indicated. The District Court reaffirmed its previous order (Memorandum of Decision, May 18, 1981; Pet. Appx. 23). The County again appealed.

The challenged orders, which have been stayed pending appeal, require that the jail administrators: (1) allow low-risk detainees who are imprisoned for more than one month[3] to receive one contact visit per week, up to a maximum of 1,500 such visits per week; (2) permit available inmates to observe, under certain specified conditions (Pet. Appx. 35), searches of their cells.[4]

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3 / Originally the court was of the view that contact visitation should be allowed low risk pretrial detainees after two weeks of incarceration because the classification of the detainees is completed within that time. (Pet. Appx. 38-39) However, after the post-trial hearings the time was lengthened to one month. (Pet. Appx. 33)

4 / The third order appealed from, which the court below reversed (Pet. Appx. 15), required the reinstallation of windows which respondents had cemented shut. The actual wording of the two orders affirmed by the Ninth Circuit (ibid.) is:

> 2. Visitation
> " . . .
> ..(b) Contact Visits. . . . [D]efendants will make available a contact visit once each week to each pretrial detainee that has been held in jail for one month or more, and concerning whom there is no indication of drug or escape propensities; provided however, that no more than fifteen hundred such visits need be allowed in any one week. In the event that the number of requested visits in any week exceeds fifteen hundred, or such higher number as the Sheriff voluntarily undertakes to accommodate, a reasonable system of rotation or other priorities may be maintained. The length of such visits shall remain in the discretion of the Sheriff." (Pet. Appx. 38)
>
> 8. Cell Searches
> Inmates that are in the general area when a 'shakedown' inspection of their cells is undertaken shall be permitted to be sufficiently proximate to their respective cells that they may observe the process and respond to such questions or make such requests as circumstances may indicate." (Pet. Appx. 40)

In its analysis of the County's blanket restriction against any form of contact visitation, the District Court rejected, because of the potential security burdens and the physical limitations of the Central Jail, contentions by respondents that unlimited contact visits should be provided (Pet. Appx. 32). At the same time the Court expressed concern over the adverse psychological effects caused by the lack of physical contact with family members over prolonged periods of time, effects supported by the evidence presented at trial (Pet. Appx. 31). After carefully reviewing the potential security problems created by contact visitation, examining the modest physical alterations that would be necessary, and considering the length of time spent in the jail by sizable portions of the inmate population, the District Court concluded that the loss of contact over a prolonged period was an unreasonable and exaggerated response by the County. (Pet. Appx. 25-26.) Its conclusion was based upon solid evidence in the record. Experts testified as to the importance of contact visitation, the punitive nature of denying it, its effectiveness as a potent disciplinary measure because prisoners exercise self control in order to preserve it, that it can be conducted without jeopardizing institutional security. Even the Sheriff's own witness, Lt. Lonergan, conceded the absence of institutional necessity for depriving the inmates of the privilege; that it was only the matter of resources that prevented implementation of contact visits at the jail.

It was in the light of this record that the narrow order above described was entered. (Pet. App. 38.)

The Court below likewise recognized the restraints of this Court's decision in Wolfish (Pet. Appx. 4). It

acknowledged that contact visitation is not constitutionally mandated for all detainees in all facilities (Pet. Appx. 8). However, it also concluded that the denial of all contact visitation may be an unreasonable, exaggerated response to legitimate non-punitive objectives of the institution and is not per se beyond court scrutiny, if the court recognizes the important security interest of the institution, and at the same time evaluates the punitive psychological effects which the prolonged loss of contact visitation has upon detainees. Ibid. It concluded that the District Court had fashioned a narrowly drawn order, based upon the evidence in the case, which recognized the capacities, limitations, and security risks of the particular facility involved and which should not be reversed. Ibid.

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In constructing the narrow order requiring available inmates to be permitted to observe and make inquiries during unannounced searches of their own cells, the District Court limited its ruling to those inmates near enough to observe and raise or answer any relative inquiry. (Pet. Appx. 35) The order does not restrict in any manner the right of jail administrators to pursue unannounced searches, nor does it limit searches when affected inmates are not in the general area (at meal service, exercise, or at court). The order was fashioned only after the District Judge visited the jail and personally observed four alternate methods of cell searches. (Pet. App. 36, 9.) The order requires that Central Jail administrators make one minor modification to their present procedure of searching all of the cells in a row (while inmates in that row are contained in a day room) by having available inmates returned to the cell area, one at a time, to observe the search of their respective cells, at the conclusion of which they are locked in their cells and the remaining cells searched in the same manner. Thus there can be no frustration of the searches as was the case in Wolfish.

The evidence presented at trial, the limited nature of the order, Fourteenth Amendment due process concerns, the potentially punitive manner in which unobserved cell searches are conducted, the minor modification of procedures necessary to carry out the change, and the trial court's affirmation of the right of jail administrators to carry out searches led the Ninth Circuit to conclude that the District Court paid proper deference to the jail administrators' concerns about

security, and it affirmed the limited modification of Central Jail search procedures. (Pet. Appx. 9-12).

REASONS FOR DENYING THE WRIT

Preliminary Statement

This is not a case of a trial court disregarding the teachings of this Court in Wolfish and other cases and making "'judgment calls'" that "are confided to officials outside of the Judicial Branch of government." (Wolfish, supra, 441 U.S. at 562.) Rather it is a case of a conscientious court limiting its rulings to the particular conditions that violated the Constitution. While the trial court did require a number of changes made necessary by the "sordid aspects" (Ibid.) of the Los Angeles County Jail, changes which the County accepted and did not appeal,[5] it likewise refused to interfere with conditions which, though deleterious, did not in the court's judgment rise to the constitutional deprivation which would have permitted court intervention.[6]

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5 / Such as having a mattress and bed or bunk on which to sleep (Pet. Appx. 37); a few minutes (15) within which to eat (Pet. Appx. 40); a place to sit down while waiting long periods of time to be taken to court (Pet. Appx. 39).

6 / Such as installation of upright lengths of steel pipe which effectively ruined the recreation area on the rooftop of the County Jail so that it could not be used as a basketball court (Pet. Appx. 52); limited sleeping space despite an earlier finding that the multiple occupancy cells "present poor examples of the civilized standards and concepts of dignity, humanity and decency to which Justice Blackmun made reference in Jackson v. Bishop"(404 F.2d 571, 579 [8th Cir. 1968]) (Pet. Appx. 46). In this connection it is not amiss to point out that the cell space the trial court allowed is less than 25 square feet of floor space per man, an amount far less than the 40 square feet prescribed by California's Minimum Jail Standards and a number of cases (Pet. Appx. 45-47). The court also allowed and refused to change a practice in the jail whereby, under certain circumstances, detainees were required to sleep on the floor for one night. (Pet. Appx. 37-38) It permitted petitioners' outdoor recreation schedule of only 2 1/2 hours per week, conceding that this is considerably less than what other courts had required. (Pet. Appx. 50-51) It refused greater access to law library facilities (Pet. Appx. 63). It denied brutality claims (Pet. Appx. 64). And even as to violations of the order the court had made, the court required the inmate to exhaust an administrative procedure before the court would entertain any application for contempt. (Pet. Appx. 40-41)

Both the trial court (Pet. Appx. 24-25) and the court below in affirming (Pet. Appx. 3-4) paid scrupulous attention to this Court's teachings in Wolfish and properly held that petitioners' blanket refusal under all circumstances to allow contact visitation or to allow search observation was unreasonable, excessive and an exaggerated response to legitimate institutional concerns.

1. The Decision Below Concerning Contact Visitation Involves A Limited Order Based Upon the Conditions Peculiar To the Los Angeles County Central Jail, Does Not Raise Significant Legal Issues of General Application and Is Not In Conflict With Decisions of Other Courts of Appeal.

a. The District Court, in fashioning its limited contact visitation order, based its decision on conditions peculiar to the Central Jail. (Pet. Appx. 48-49). The District Court and Ninth Circuit opinions that the County's blanket restriction against all forms of contact visitation for all detainees regardless of classification status over prolonged periods of time represented an unreasonable and exaggerated response were based upon the specific physical structure of the Central Jail, the length of time that pretrial detainees are held in the Central Jail, and the security considerations of Central Jail administrations. This analysis is fully consistent with the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Wolfish, supra, 441 U.S. at 546. The District Court's judgment was based upon the specific facts that were presented, it did not promulgate rules of general application, and its factual analyses were not and should not be questioned upon appeal.

b. The legal analysis of the District Court and the Court below concerning the blanket restrictions on contact visitation in the Central Jail does not differ from post-

post-Wolfish decisions of other circuits, even those cases which reached the opposite result. Of the cases cited at page 6 of the Petition for Writ of Certiorari, five are post-Wolfish. The instant case is in conflict with none of them.

In Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) cert.den. 450 U.S. 1041 (1981) the plaintiffs complained of a contact visitation policy that allowed kissing, hand holding, and the holding of children on the inmate's lap, a policy very different from the thick glass shields, power phones and the lack of contact here. The affirmance by the Tenth Circuit of the trial court's denial there to a policy of unlimited (and unknown) contact can hardly be said to be contrary to the order at bar. Moreover, in Ramos, a certain class of inmates, those in segregated units, was denied all contact visitation. They complained of this absolute prohibition and were rejected by the court. (639 F.2d at 580, fn.26) Likewise in the case at bar, Judge Gray rejected the claims for contact visitation of a large number of inmates. (Pet. Appx. 32) Thus, the cases do not collide.

The denial of contact visitation in Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980) was based on proof that extensive new facilities and the hiring of additional personnel would be needed and that only five percent of detainees remained in that facility for more than thirty days.[7/] In contrast, 75% of the pretrial detainees in the Central Jail of Los Angeles County face three months or more of incarceration and the trial court's limited order applies only to low-risk detainees who have been incarcerated for more than 30 days.

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7 / This Court in Wolfish pointed out at least four times (441 U.S. at 543, 552, 555, 562) that its decision on the facts of that particular case was influenced by the generally short duration of incarceration of the pretrial detainees.

The denial of contact visitation in Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979) was based on conditions and security problems peculiar to that institution. The affirmance by the Court of Appeals of the trial court's order there was simply that "[t]he district court chose to credit that testimony [concerning the contraband problem in that particular jail] and we cannot say that its decision was clearly erroneous." (612 F.2d at 754)

Jones v. Diamond, 636 F.2d 1364, 1377-78 (5th Cir. 1980) cert.dismissed, 453 U.S. 950 (1981) is, of course, not in conflict with the case at bar. The court there did just what the trial court did here. "Whether or not contact visitation rights should be accorded pretrial detainees can be decided only after a full hearing on the facilities available in both jails and the security requirements in each. . . . What we require is an evidentiary hearing to which the Bell v. Wolfish due process standard may be applied." (636 F.2d at 1364)

And the latest case cited by petitioners (West v. Infante, 707 F.2d 58 [2nd Cir. 1983]) is likewise in accord, not in conflict, with the case at bar. There a pretrial detainee in the Albany County Jail filed suit for damages against the sheriff because of the denial of the right to have contact visits with his family and friends. The trial court dismissed the action for failing to state a claim upon which relief could be granted. The Court of Appeals reversed, holding that the question as to whether the plaintiff had been deprived of the right complained of had to be decided not as a matter of law, but based upon the development of facts on "a proper record." (707 F.2d at 59)

It is to be remembered that in the case at bar neither the trial court in its limited and tailored order (Pet.

Appx. 38), nor the Court below in its affirmance (Pet. Appx. 8), held that contact visitation is mandated for all detainees in all facilities. To the extent that petitioners here claim that the courts below so did and therefore are in conflict with other circuits, they are clearly in error. There is no conflict warranting this Court's review.

2. The Decision Below Concerning Cell Searches Does Not Conflict With Any Applicable Decision of This Court.

Petitioners claim (Pet. 6) that the trial court's order here is in conflict with this Court's decision in Wolfish. That is not the case. The District Court's order modifying present procedures for cell searches allows for available individual inmates who had been removed from their row and secured in a nearby dayroom, to be returned to observe, one at a time, the search of their individual cell and then be locked up in it. It in no way restricts the discretion of the Central Jail administrators to perform "shakedowns" at any time, to search without restriction the cells of inmates at meals, court or exercise, nor does it alter present practices of removing inmates from the cell rows being searched, nor does it limit the right to search personal items as well as cell units. The District and Appellate decision reversed in Wolfish, represented "a challenge to the room-search rule in its entirety, and the lower courts have enjoined the practice itself." (441 U.S. at p. 557, footnote 38). The decision in this case does not present a similar issue.

Moreover, the actual method in use at the Metropolitan Correctional Center discussed in Wolfish, was such that the inmates could "frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team." (441 U.S. at 555). There is no such

possibility here. The trial judge personally observed four alternative methods presented by petitioners and chose the one (Method C) which satisfied both the needs of the jail and the Constitutional rights of the inmates. Specifically acknowledging this Court's admonition in Wolfish, (Pet. Appx.27), he said (ibid): "Having witnessed the comparative ease and institutional security and safety under which a prisoner can be allowed to observe the search of his cell, it seems to me that to refuse such observation is contrary to the Due Process Clause of the Fourteenth Amendment."8/

Finally, it is to be remembered that the attack in Wolfish, in addition to being on the entire concept of unanounced cell searches themselves, was based upon the Fourth Amendment. That is not the basis of the order here. After recalling that he had first hand witnessed two instances where the observation by the inmate prevented his property from being improperly confiscated (Pet. Appx. 36), the trial Court said (Pet.Appx. 28): "Due process, after all, means fair treatment under the circumstances. I believe that to allow these prized possessions to be confiscated under subjectively enforced regulations, without giving the possessor any opportunity to explain or protest or entreat, deprives him of his property without due process of law." Certainly Bell v. Wolfish does not contradict that principle.

8/ What the judge said about that visit bears repeating and demonstrates the constitutional correctness of the order.

> [W]hile I was watching the search of that very cell, one of the deputies started to remove a magazine as not being sufficiently current and thus in violation of regulations designed to minimize fire danger by preventing accumulation of old periodicals. Upon being asked to reconsider, the deputy found that it was not as old as he had thought and left it. The same deputy started to discard another magazine on the ground that it lacked a cover. The inmate urged him to riffle the pages a bit; he did; the cover thereupon appeared; and the magazine stayed in the cell.
>
> These are small matters; but they are important to the detainees, and their legitimate interests in protecting their meager possessions outweigh the small increase in the burden upon the defendants. (Pet. Appx. 36)

CONCLUSION

While it is true that in Wolfish, this Court said (441 U.S. at 525) that its analysis does not turn on the particulars of the Metropolitan Correctional Center concept or design, it is nevertheless also true that the Court felt the particular facts important enough to point out (Ibid.) that "The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates . . . [R]esidential units . . . replace the traditional cellblock jail construction. Each unit . . . has several clusters or corridors of private rooms or dormitories radiating from a central 2-story 'multipurpose' or common room, to which each inmate has free access 16 hours a day." So the facts of the particular institution are important. The trial court's orders attacked here are carefully tailored with reference to the particulars of the Los Angeles County Central Jail. This Court should not spend its time or energy reviewing them. No general principles are at stake; there are no conflicts between the circuits; there is no conflict with any applicable decision of this Court.

The Petition for Writ of Certiorari should be denied.

Dated: October 14, 1983

Respectfully submitted,

FRED OKRAND
JOHN H. HAGAR, JR.

Attorneys for Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, certify that I am a citizen of the United States, a resident of the State of California, County of Los Angeles, over the age of 18, and not a party to the within entitled action; my business address is 633 South Shatto Place, Los Angeles, California 90005.

On October 14, 1983, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on all parties required to be served by depositing three copies thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office facility regularly maintained by the Government of the United States at Los Angeles, California, addressed to each of said parties or their attorneys of record as follows:

Donald K. Byrne
Chief Deputy County Counsel

Frederick Bennett
Principal County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

I am employed by Fred Okrand, a member of the Bar of this Court and a member of the State Bar of California, at whose direction this service was made. I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on October 14, 1983.

LYNDA HALL

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MOTION OF RESPONDENT DENNIS RUTHERFORD FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN DEFENSE AGAINST PETITION FOR WRIT OF CERTIORARI AND AGAINST WRIT OF CERTIORARI IF GRANTED; DECLARATION IN SUPPORT

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MOTION OF RESPONDENT DENNIS RUTHERFORD FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN DEFENSE AGAINST PETITION FOR WRIT OF CERTIORARI AND AGAINST WRIT OF CERTIORARI IF GRANTED; DECLARATION IN SUPPORT

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that respondent Dennis Rutherford be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached declaration. On March 14, 1979 the District Court entered an order allowing respondent to defend the appeal in forma pauperis.

Dated: October 14, 1983

FRED OKRAND
JOHN H. HAGAR, JR.

By _____
Fred Okrand
Attorneys for Respondents

DECLARATION OF DENNIS RUTHERFORD IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN DEFENSE AGAINST PETITION FOR WRIT OF CERTIORARI AND AGAINST WRIT OF CERTIORARI IF GRANTED

I, Dennis Rutherford, declare:

I am one of the respondents in the within action. In support of my motion to proceed in my defense against the petition for writ of certiorari and against the writ of certiorari, if granted, without being required to prepay costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am entitled to redress; and that the issues I am required to resist are:

> Whether this Court should grant certiorari to review, and, if granted, to reverse, the lower court's judgment affirming the judgment of the trial court, precise and tailored to the special conditions of the Los Angeles County Jail, providing for (1) contact visitation of a limited number of pretrial detainees and (2) the opportunity for inmates to be present and observe and, if necessary, make inquiries during, searches of their cells under carefully circumscribed conditions which make it impossible for inmates to frustrate the searches.

I further declare that the responses which I have made to the questions below relating to my ability to pay the cost of defending this proceeding are true.

1. Are you presently employed?

   No. Last employment about a year ago receiving about $400 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or

other source?

No.

3. Do you own any cash or checking or savings account?

No checking or savings account. Have $50.00 in cash.

4. Do you own any real estate, stocks, bonds, notes, automobile, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California this 15th day of September, 1983.

Dennis Rutherford

DENNIS RUTHERFORD

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, certify that I am a citizen of the United States, a resident of the State of California, County of Los Angeles, over the age of 18, and not a party to the within entitled action; my business address is 633 South Shatto Place, Los Angeles, California 90005.

On October 14, 1983, I served the within

MOTION OF RESPONDENT DENNIS RUTHERFORD FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN DEFENSE AGAINST PETITION FOR WRIT OF CERTIORARI AND AGAINST WRIT OF CERTIORARI IF GRANTED; DECLARATION IN SUPPORT

on all parties required to be served by depositing a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office facility regularly maintained by the Government of the United States at Los Angeles, California, addressed to each of said parties or their attorneys of record as follows:

Donald K. Byrne
Chief Deputy County Counsel
Frederick R. Bennett
Principal Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

I am employed by Fred Okrand, a member of the Bar of this Court and a member of the State Bar of California, at whose direction this service was made. I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on October 14, 1983.

LYNDA HALL